IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2005 Session

# STATE OF TENNESSEE v. NEW BEGINNING CREDIT ASSOCIATION, INC. ET AL.

**Appeal from the Chancery Court for Davidson County**
**No. 97-313-III Ellen Hobbs Lyle, Chancellor**

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**No. M1999-00461-COA-R3-CV - Filed on May 25, 2006**

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This appeal involves an enforcement action against a credit services company. The State of Tennessee filed a complaint under the Tennessee Credit Services Businesses Act and the Tennessee Consumer Protection Act of 1977 against the company, its president, and several related entities. Following an expedited bench trial, the trial court found that the defendants had violated both statutes, entered a permanent injunction against future violations, and set a hearing on further remedies. The court later awarded the State over $42,000 in attorney's fees and costs and levied $46,200 in civil penalties against the credit repair company and its president. The court declined to order restitution to the company's customers, and the State appealed. We have concluded that the trial court erred by finding that the company rendered complete performance to its customers as required by the Tennessee Credit Services Business Act and by refusing to award restitution to the company's customers on the ground that it would be impractical and ineffective. Accordingly, we affirm the trial court's decision in part, vacate its denial of restitution, and remand the case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Vacated in Part, and Remanded**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Russell T. Perkins, Deputy Attorney General, for the appellant, State of Tennessee.

Joseph L. Lackey, Jr., Nashville, Tennessee, for the appellees, New Beginning Credit Association, Inc., Credit Alliance, Inc., Credit Connection, Inc., New Beginning Financial Alliance, and Frank Andre William Iaquinta.

## OPINION
## I.

Frank Andre William Iaquinta[1] began working as a salesperson for Second Chance Credit Association (Second Chance) in 1992. Second Chance marketed credit services to clients whose credit ratings were so unfavorable that they were unable to obtain credit cards with limits as low as $300. In return for a fee paid in advance, the company promised to assist its clients in repairing their credit by arranging for them to obtain a credit card in their own name that would appear as "unsecured" on credit reports even though it was partially backed by life insurance policies. The idea was for the clients to make charges on the credit card, pay the credit card bill in a timely manner, and thereby improve their credit history.

In 1993, Mr. Iaquinta started his own credit services business, New Beginning Financial Alliance (NBFA), based on the same business model used by Second Chance. Shortly after NBFA opened, the insurance company that issued the life insurance policies to back the credit cards cancelled its arrangement with Mr. Iaquinta, and he was forced to close the business. Nine NBFA clients filed consumer complaints about NBFA with the State of Tennessee.

Mr. Iaquinta evidently desired to remain in the credit services business. Within a three-month period in early 1994, he incorporated three related companies: New Beginning Credit Association, Inc. (NBCA), Credit Connection, Inc. (Credit Connection), and Credit Alliance, Inc. (Credit Alliance).[2] Mr. Iaquinta paid refunds to several NBFA clients and transferred other accounts to NBCA. Thereafter, Mr. Iaquinta placed NBFA in bankruptcy.

While NBCA targeted the same clients as NBFA, it operated on a slightly different business model. The credit cards offered through NBCA had limits ranging from $300 up to $1,000. Instead of purchasing life insurance to back the cards, NBCA itself guaranteed partial repayment of its clients' debts on their new credit cards. The banks issuing the credit cards required NBCA to deposit forty percent of the approved limit of each credit card into an escrow account that could be used to repay the debt in the event of default. NBCA also arranged credit lines with a mail-order company and a long distance telephone carrier so that its clients could purchase items from a nationwide merchandise catalogue and secure long distance telephone services on credit. Finally, NBCA promised its customers access to discounts on a wide variety of products and services ranging from car rentals, groceries, and hotel rooms to legal services, dental and eye care services, and prescription medications.

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[1]The covers of the briefs on appeal list this party's name as "Frank Andre William *Acantha*" while the text of the briefs refer to him as "Frank Andre William *Iaquinta*." Counsel for the parties on appeal have not bothered to explain the reasons for the discrepancy to this court. From the record, it appears that this individual signs his name as "Iaquinta," not "Acantha." Accordingly, we will use the name "Iaquinta" throughout this opinion.

[2]Credit Connection and Credit Alliance were formed to facilitate the transition from NBFA to NBCA. Credit Connection processed and serviced the accounts Mr. Iaquinta acquired from NBFA and Second Chance. In addition, Credit Connection and Credit Alliance "sponsored" the services offered by NBCA.

NBCA charged it clients a $1,139 "membership fee" to participate in its three-year credit repair program. Clients had three options for paying the membership fee: (1) pay the entire $1,139 up front;[3] (2) make a $149.00 down payment with monthly payments of $91.19 for the first year and $9.95 per month for the last two years; or (3) make a $149.00 down payment with monthly payments of $49.86 for the first two years followed by $9.95 per month for the final year of the program. Clients were also allowed to charge the membership fee on their new credit cards. A client could not become a "member" without first paying NBCA at least $149, which could be charged to their new credit card.[4] In addition to the membership fee, NBCA required its clients to make a one-time payment of $69.95 to obtain the line of credit with the mail-order catalogue company and a $100.00 payment to obtain a second credit card with a credit limit ranging from $300.00 to $600.00.

Mr. Iaquinta aggressively advertised NBCA's services in newspapers in Tennessee and elsewhere. The advertisements offered "Good People With Bad Credit" the opportunity to "[r]eestablish credit with your very own unsecured Visa." The ads promised that this opportunity was available "regardless of your past credit history" and claimed that NBCA had been "Serving America Since 1992," even though the company was not incorporated until 1994. The ads were plainly intended to and did convey the message that NBCA's credit services would be provided at no cost to the consumer[5] with claims such as "No Application or Processing Fees," "No Lump Sum Cash Deposit Required," "ABSOLUTELY NO Application Fees or Security Deposits," and "Absolutely No Application Fees!" The advertisements invited consumers to "Call Now" for a "Quick Pre-Approval That Takes About 3 Minutes Over the Phone."

Consumers who responded to NBCA's advertisements were in for two big surprises. First, the "Quick 3-Minute Pre-Qualification" process turned out to be an interview that generally took over two hours to complete. Second, the telemarketers who answered the calls informed potential customers that "[t]here are fees involved" but stated that "you have a variety of options and can get started with as little as $25." NBCA specifically instructed its representatives not to explain the costs and fees required to participate in the program over the telephone. At the conclusion of the laborious telephonic pre-approval process, callers were told the time, date, and location of an informational seminar they were required to attend in order to participate in the program. It was not until consumers attended the seminar that they were finally told about the $1,139 "membership fee" and the other charges required to participate in NBCA's credit repair program.

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[3]While the initial credit limits on the credit cards generally ranged from $300 to $1,000, NBCA also offered clients a credit card with a limit of $1,200 if they desired to pay the entire $1,139 membership fee on credit. After paying the membership fee, as well as an additional $45 charge, the clients were left with only $16 of available credit.

[4]Clients also had the option of making an initial payment of just $25 to NBCA. However, according to Mr. Iaquinta, they did not receive access to any of NBCA's products or services until they paid the remainder of the $149 down payment. Mr. Iaquinta described this scheme as akin to a "layaway" program.

[5]Many credit services organizations are non-profit corporations.

Following the seminar, NBCA provided consumers with written form contracts and disclosure statements promising to provide them with "benefit programs such as Visa® card sponsorship, catalog merchandise credit card, [and] discount buying services" in return for payment of the $1,139 membership fee. However, contrary to its representations, NBCA did not and could not "re-establish" its customers' creditworthiness, nor did it provide them with meaningful access to the promised discount buying services. In addition, NBCA pursued aggressive collection practices against customers who fell behind in the payment of the membership fees, thereby further damaging their credit histories. NBCA's misrepresentations and other actions resulted in the filing of more than a dozen consumer complaints with the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance.

On January 28, 1997, the State filed a complaint in the Chancery Court for Davidson County against Mr. Iaquinta, NBCA, Credit Connection, Credit Alliance, and NBFA. The complaint alleged violations of the Tennessee Credit Services Businesses Act[6] and the Tennessee Consumer Protection Act of 1977.[7] The trial court temporarily enjoined the defendants from continuing their deceptive marketing campaign and ordered them to investigate the existing consumer complaints, provide reports to the court on the investigation and the current status of all of its consumer contracts, and turn over certain information and materials to the State.

The court conducted an expedited bench trial on January 9, 1998 and entered an order the same day concluding that: (1) NBCA was a credit services business covered by the Tennessee Credit Services Businesses Act; (2) NBCA did not violate Tenn. Code Ann. § 47-18-1003(1) of the Tennessee Credit Services Business Act by failing to provide "full and complete performance" of the services it agreed to provide to consumers before charging them or accepting money from them; (3) NBCA had violated other provisions of the Tennessee Credit Services Businesses Act and the Tennessee Consumer Protection Act; and (4) Mr. Iaquinta was liable for violations of the Tennessee Consumer Protection Act because of his knowledge of and control over NBCA's advertising, telemarketing, and discount buying services program. The court permanently enjoined NBCA and Mr. Iaquinta from making certain deceptive claims and set a hearing on further relief.

On July 15, 1998, the court entered an order awarding the State $42,163.80 in attorney's fees and costs and, on December 22, 1998, entered another order assessing civil penalties of $42,000 against NBCA and $4,200 against Mr. Iaquinta. The court rejected the State's request for restitution for consumers on two grounds. First, the court concluded that it lacked jurisdiction to impose a restitution award for consumers who resided outside Tennessee unless they attended one of NBCA's Tennessee seminars. Second, the court determined that a restitution award would not be "practical, cost-effective, necessary or effective" given the variety of both the services offered by NBCA and the complaints lodged by NBCA's customers.

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[6]Tenn. Code Ann. §§ 47-18-1001 to -1011 (2001).

[7]Tenn. Code Ann. §§ 47-18-101 to -126 (2001 & Supp. 2005).

The State filed a Tenn. R. Civ. P. 59.04 motion challenging three aspects of the trial court's orders. First, the State claimed that the court had erred by concluding that NBCA did not violate Tenn. Code Ann. § 47-18-1003(1) by charging or accepting money prior to "full and complete performance" of the services it had agreed to perform for consumers. Second, the State argued that the court had erred by concluding that restitution was not practical, feasible, or cost-effective. Third, the State insisted that the court had erred by determining that it lacked the authority to award restitution to out-of-state consumers. The trial court denied the State's post-trial motion, and the State appealed. Like its predecessor NBFA, NBCA filed for bankruptcy protection, and on November 24, 1999, this court stayed the appeal pending the outcome of the bankruptcy proceeding.

In 2004, the State notified this court that the federal bankruptcy proceeding had been concluded. The bankruptcy court discharged NBCA's debts, and NBCA was dissolved by the Tennessee Secretary of State. On August 13, 2004, we entered an order lifting the stay of the State's appeal, and on November 4, 2004, we entered an order directing the State to show cause why the appeal should not be dismissed as moot as a result of the bankruptcy discharge. In its response to the show cause order, the State argued that NBCA's discharge in bankruptcy did not render the appeal moot and that even if it did, this court should nevertheless hear the appeal because it presents issues of public interest and importance to the administration of justice and involves a situation that is capable of repetition yet evading review. On November 19, 2004, we entered an order concluding that the State had successfully demonstrated why the appeal was not moot.

## II.
## THE STANDARDS OF REVIEW

Because this is an appeal from a decision made by the trial court itself following a bench trial, the now familiar standard in Tenn. R. App. P. 13(d) governs our review. This rule contains different standards for reviewing a trial court's decisions regarding factual questions and legal questions. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). However, if the trial judge has not made a specific finding of fact on a particular matter, we review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *McCormick v. Aabakus, Inc.*, 101 S.W.3d 60, 62 (Tenn. Sp. Workers Comp. Panel 2000); *Hicks v. Cox*, 978 S.W.2d 544, 547 (Tenn. Ct. App. 1998).

## III.
## THE TENNESSEE CREDIT SERVICES BUSINESSES ACT

The State claims that the trial court erred in concluding that NBCA rendered "full and complete performance" before accepting payment from consumers as required by the Tennessee Credit Services Business Act, that it lacked jurisdiction under the Tennessee Consumer Protection Act to award restitution for out-of-state consumers who did not attend seminars in Tennessee, and that an award of restitution would be impractical and ineffective. NBCA and Mr. Iaquinta dispute the State's contentions, and NBCA argues additionally that the trial court erred by concluding that it is a credit services business subject to the requirements of the Tennessee Credit Services Businesses Act.

NBCA takes issue with the trial court's conclusion that it is a credit services business subject to the requirements of the Tennessee Credit Services Businesses Act. Alternatively, NBCA contends that even if it is a credit services business, the trial court properly concluded that it rendered "full and complete performance" of its obligations to consumers before accepting payment from them by providing them with credit card applications and by giving them access to its discount buying services. For its part, the State disputes both of NBCA's arguments.

### A.

So-called "credit repair" or "credit services" businesses and organizations emerged on the commercial scene in the 1980s.[8] They advertised their ability to get consumers out of debt in very short time periods despite the limited possibilities for doing so legally and often encouraged consumers to engage in fraud to accomplish such extraordinary results.[9] Lured in by the companies' false promises, heavily debt-laden consumers in precarious financial situations signed up for the programs in large numbers and paid the required fees with money that would have been much better spent paying down their mounting debts.[10] While these programs took many forms - e.g., conducting educational seminars, or providing consumers with access to secured or unsecured credit cards as a way of building up their credit - they had one common feature. As one commentator has explained, "the hallmark of most credit repair organizations was the billing of advance fees to consumers before any credit repair services were provided."[11]

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[8] *Federal Trade Comm'n v. Gill*, 265 F.3d 944, 949 (9th Cir. 2001); Marta Lugones Moakley, *Credit Repair Organizations After Regulation: Wolves in Nonprofits' Clothing?*, Fla. B.J., July/Aug. 2003, at 28 (Moakley).

[9] Eugene J. Kelley, Jr. et al., *The Credit Repair Organization Act: The "Next Big Thing?,"* 57 Consumer Fin. L.Q. Rep. 49, 49 (2003) (Kelley); Moakley, Fla. B.J., at 28.

[10] *Alexander v. U.S. Credit Mgmt., Inc.*, 384 F. Supp. 2d 1003, 1014 (N.D. Tex. 2005); Moakley, Fla. B.J., at 28.

[11] Moakley, Fla. B.J., at 30.

In response to widespread abuses in the industry, most states and the federal government enacted legislation to protect consumers from the sharp business practices of credit repair and credit services businesses and organizations.[12] By 2003, thirty-eight states and the federal government had passed laws regulating entities offering fee-based services to consumers designed to improve their credit ratings.[13] The Tennessee Credit Services Business Act requires credit services businesses to enter into written contracts with their clients that include the "terms and conditions of payment" and a "complete and detailed description of the services to be performed and the results to be achieved by the credit services business for or on behalf of the consumer." Tenn. Code Ann. § 47-18-1006(a)(2), (3). Consumers have ten days to cancel an agreement with a credit services business, and this and other protections afforded by the act cannot be waived. Tenn. Code Ann. §§ 47-18-1006(b), -1007(c). The Act exempts from its coverage non-profit corporations and certain entities that are already subject to oversight under separate regulatory schemes.[14]

The Tennessee Credit Services Businesses Act also contains broad prohibitions against deceptive or fraudulent representations or acts in connection with the provision of credit services. Credit services businesses cannot "[m]ake or use any untrue or misleading representations in the offer or sale" of their services, nor can they "engage, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deception upon any person in connection with the offer or sale" of their services. Tenn. Code Ann. § 47-18-1003(4). Liability attaches for untrue or misleading representations even where the representation was not made or used for the purpose of inducing consumers to purchase particular products or services. *See Federal Trade Comm'n v. Gill*, 265 F.3d at 955. Finally, the Act prohibits credit services businesses from "[c]harg[ing] or receiv[ing] *any* money or other valuable consideration prior to *full and complete performance* of the services that the credit services business has agreed to perform for or on behalf of the consumer, *including all representations made orally or in writing*." Tenn. Code Ann. § 47-18-1003(1) (emphasis added). Tenn. Code Ann. § 47-18-1003(1) broadly defines "full and complete performance" to apply not only to the items listed in the written contract, but also to the "fulfillment of all items listed in . . . other solicitations or communications to consumers."

**B.**

We turn first to NBCA's contention that the trial court erred in determining that it is a credit services business subject to regulation under the Tennessee Credit Services Businesses Act. This claim has no legal or factual basis. The Act defines a "[c]redit services business" as:

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[12]The federal statute is the 1996 Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j (CROA).

[13]Kelley, 57 Consumer Fin. L.Q. Rep. at 56.

[14]Tenn. Code Ann. § 47-18-1002(5)(B) (exempting non-profits and federally insured banks, trust companies, and savings institutions, Tennessee and federal credit unions, real estate brokers, attorneys, registered securities or commodity futures brokers, and credit reporting agencies); *cf.* 15 U.S.C.A. § 1679a (exempting non-profits, banks, state and federal credit unions, and their affiliates and subsidiaries).

> any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform any of the following services in return for the payment of money or other valuable consideration: (i) [i]mproving a consumer's credit record, history, or rating; (ii) [o]btaining an extension of credit for a consumer; or (iii) [p]roviding advice or assistance to a consumer with regard to either (i) or (ii) . . . .

Tenn. Code Ann. § 47-18-1002(5)(A). NBCA easily satisfies all three tests for credit services business, and NBCA does not attempt to invoke the statutory exemption for non-profits and entities governed by pre-existing regulatory schemes. Moreover, in signed and notarized surety bonds filed with the State, NBCA has repeatedly described itself as a corporation "doing business as a credit service business, as defined in Tennessee Public Chapter No. 897, Acts 1988," i.e., the Tennessee Credit Services Businesses Act.[15] Accordingly, the trial court did not err in determining that NBCA is a credit services business subject to the requirements of the Tennessee Credit Services Businesses Act.

**C.**

The State takes issue with the trial court's conclusion that NBCA was not violating the restriction in Tenn. Code Ann. § 47-18-1003(1) against charging or receiving any fees before completely performing its services. NBCA responds that it would be unable to operate if the State's interpretation of Tenn. Code Ann. § 47-18-1003(1) were correct and, therefore, that the trial court correctly concluded that NBCA had rendered "full and complete performance" by providing consumers with credit card applications and allowing them access to its discount buying services. The undisputed facts support the State's argument.

NBCA does not dispute that it offered its clients three-year contracts, during which time NBCA was presumably working hard to help its clients "re-establish" their damaged credit ratings. Throughout this three-year period, NBCA's clients were required to make payments every single month in order to continue receiving NBCA's credit repair services unless, of course, NBCA had accepted payment of the entire $1,139 fee up front. Moreover, NBCA acknowledges, as it must, that it required its clients to make down payments of at least $149 before allowing them access to the credit cards and discount buying programs.

NBCA seems to think that it satisfied the requirements of the Tennessee Credit Services Businesses Act by providing a portion of its services prior to receiving the final payments from clients in most cases. However, the Tennessee Credit Services Businesses Act does not say that a credit services business cannot receive any payments from consumers until it has provided *some* of

[15]NBCA filed similar surety bonds in Oklahoma, Florida, Texas, and North Carolina acknowledging its status as a credit services business under their statutes governing credit services and credit repair businesses and organizations.

the credit repair services it has agreed to furnish. To the contrary, it states broadly that a credit services business "shall not . . . [c]harge or receive any money or other valuable consideration prior to full and complete performance[16] of the services that the credit services business has agreed to perform for or on behalf of the consumer." Tenn. Code Ann. § 47-18-1003(1) (footnote added). Thus, the statutory text unambiguously requires a credit services business to forego *any* compensation from a consumer prior to completion of *every* service it has agreed to provide, and the fact that a credit services company has rendered some services before accepting full or partial payment is irrelevant.[17]

The trial court's ruling also contradicts its specific finding that NBCA failed to provide meaningful access to the promised discount buying services NBCA continued to accept $149 down payments and monthly payments from its clients in spite of their inability to access the discount buying services. Whether characterized as down payments, deposits, layaway plans, or something else, anything that amounts to a full or partial payment up front is prohibited by the Tennessee Credit Services Businesses Act, and the trial court's own findings show that NBCA did not abide by this restriction.

The inescapable conclusion is that NBCA flagrantly violated the requirements of the Tennessee Credit Services Businesses Act with its system of down payments and installment contracts. Simply put, Mr. Iaquinta structured and operated his businesses in a manner that is expressly prohibited by both the Act and federal law. To the extent that Mr. Iaquinta feels that the statutory requirements have unduly restricted his business opportunities, his complaint is more properly directed to the Tennessee General Assembly and Congress. The trial court's ruling is insupportable under the facts of this case, the plain language of the Tennessee Credit Services Businesses Act, and the trial court's own findings. Accordingly, the trial court erred in determining that NBCA rendered "full and complete performance" of its obligations to its customers merely by giving them the applications for the unsecured credit cards and providing them with access to discount buying services which, by their very nature, could only be used over time.

## IV.
## RESTITUTION UNDER THE TENNESSEE CONSUMER PROTECTION ACT

The State takes issue with the trial court's two reasons for denying its request for restitution on behalf of NBCA's clients. First, the State insists that the trial court erred by concluding that

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[16]The requirement of "full and complete performance" prior to the acceptance of any payments is not, as the trial court suggested, limited to the promises contained in the written contract between the credit services business and the consumer. The statute expressly provides that "'Full and complete performance' means fulfillment of all items listed in the contract *and* other solicitations or communications to consumers" and included "all representations made orally or in writing" regarding the services to be performed on behalf of consumers. Tenn. Code Ann. § 47-18-1003(1) (emphasis added).

[17]*Cf. Federal Trade Comm'n v. Gill*, 265 F.3d at 956 (noting that the analogous federal statute "prohibits acceptance of *any* payment before fully performing all services").

requiring restitution in this case would be impractical and not cost-effective. Second, the State argues that the trial court erred by holding that it lacked authority to award restitution to non-residents who had not attended NBCA's seminars in Tennessee. NBCA and Mr. Iaquinta concede liability under the Tennessee Consumer Protection Act,[18] and they also concede that restitution is available as a remedy under both the Tennessee Consumer Protection Act and the Tennessee Credit Services Businesses Act. Nevertheless, they insist that the trial court's conclusions regarding restitution were correct. The State has the better of both arguments.

The Tennessee Consumer Protection Act authorizes courts to award restitution for consumers in enforcement actions brought by the State in Tenn. Code Ann. § 47-18-108(b) (1) which provides:

> The court may make such orders or render such judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act, or practice, any money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, which may have been acquired by means of any act or practice declared to be unlawful by this part.

This provision authorizes restitution as long as two conditions are met. First, the person or persons seeking restitution must have "suffered an[] ascertainable loss by reason of" the unfair or deceptive trade practice at issue. Second, the restitution order must be limited to money, property, or other things of value "acquired by means of an[] act or practice declared to be unlawful" by the Tennessee Consumer Protection Act.

The requirement that consumers demonstrate that they have suffered an "ascertainable loss" as a precondition to recovery under the Tennessee Consumer Protection Act is a common feature of state statutes banning unfair and deceptive trade practices.[19] In this context, ascertainable losses include losses that would not be a cognizable injury at common-law. *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000). An ascertainable loss is a deprivation, detriment, or injury that is capable of being discovered, observed, or established. *Service Road Corp. v. Quinn*, 698 A.2d 258, 262 (Conn. 1997); *In re Wiggins*, 273 B.R. 839, 856 (Bankr. D. Idaho 2001); *Thiedemann v. Mercedes-Benz USA, Inc.*, 872 A.2d 783, 793 (N.J. 2005); *Scott v. Western Int'l Surplus Sales, Inc.*, 517 P.2d 661, 663 (Or. 1973).

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[18]NBCA's acts and practices that violated the Tennessee Credit Services Businesses Act were, by operation of law, also violations of the Tennessee Consumer Protection Act. Tenn. Code Ann. § 47-18-1010(a). Accordingly, the trial court concluded that NBCA, as well as Mr. Iaquinta, violated the Tennessee Consumer Protection Act by: (1) employing deceptive and misleading tactics in their advertising, telemarketing, and seminars; (2) claiming that they could re-establish consumers' credit when in reality they could only provide tools for consumers to use to re-establish their own credit; and (3) falsely promising to provide consumers with meaningful access to the discount buying services.

[19]*See* JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 7.5.2.1, at 550 (5th ed. 2001) (UNFAIR AND DECEPTIVE ACTS AND PRACTICES).

A loss is ascertainable if it is measurable, even though the precise amount of the loss is unknown. *Hinchliffe v. American Motors Corp.*, 440 A.2d 810, 814 (Conn. 1981); *Rein v. Koons Ford, Inc.*, 567 A.2d 101, 106-07 (Md. 1989); *Talalai v. Cooper Tire & Rubber Co.*, 823 A.2d 888, 898 (N. J. Super. Ct. 2001); *Weigel v. Ron Tonkin Chevrolet, Inc.*, 690 P.2d 488, 494 (Or. 1984); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 75 (W.Va. 2003). An ascertainable loss may include either an out-of-pocket loss or a loss in value. *Thiedemann v. Mercedes-Benz USA, Inc.*, 872 A.2d at 792. Accordingly, the courts have recognized that an ascertainable loss occurs in circumstances where a consumer receives less than what was promised. *Hinchliffe v. American Motors Corp.*, 440 A.2d at 819; *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136, 1145 (N.J. Super. App. Div. 2006); *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 57.

The ascertainable loss incurred by consumers as a result of NBCA's violations of the Tennessee Consumer Protection Act was the membership fee they were induced to pay.[20] Thus, the appropriate measure of damages is the amount of money consumers paid to NBCA to participate in its program. Restitution is available to any consumer who: (1) was misled by NBCA's deceptive advertising and telemarketing into thinking the program was free and participated in the lengthy telephone pre-approval process or attended one of NBCA's seminars as a result; or (2) was charged fees before receiving all services promised by NBCA. The detailed questionnaires submitted to the trial court by the State were far more cumbersome than was necessary to obtain the relevant information. Nevertheless, we have no doubt that the trial court will be able to devise an efficient and cost-effective method for obtaining the information necessary to make an award of restitution for consumers in light of the legal analysis we have outlined.

Finally, we disagree with the trial court's determination that it lacked jurisdiction to award restitution for consumers who were not Tennessee residents unless they attended NBCA seminars in Tennessee. To the extent the trial court's ruling was based on its reading of the statute, we think it is abundantly clear from the text of the Tennessee Consumer Protection Act that the General Assembly intended to outlaw unfair and deceptive trade practices by Tennessee businesses regardless of where the consumers harmed by these practices were located. Tenn. Code Ann. § 47-18-115 ("This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee *and elsewhere*, shall be construed to effectuate the purposes and intent.") (emphasis added).[21] To the extent the trial court's ruling was based on constitutional due process concerns,[22] it is enough to note that NBCA's incorporation in Tennessee and its and Mr. Iaquinta's

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[20]At oral argument, it was suggested that charges consumers made on the credit cards arranged by NBCA should be included in the restitution award. We see no basis for including the credit card debts that consumers voluntarily incurred after obtaining the new Visa cards in the award of restitution under the facts of the present case.

[21]The courts of other states have interpreted their unfair and deceptive trade practices statutes to extend to out-of-state consumers as well. *See* UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.4.4, at 74 & n.1049 (collecting cases).

[22]The trial court relied on *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), a United States Supreme Court case arising under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to support its conclusion that it could not impose restitution for out-of-state consumers unless they had (continued...)

extensive business activities within the state are more than sufficient to meet the Due Process Clause's requirement of "minimum contacts" for the exercise of regulatory jurisdiction. *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 646-50, 70 S. Ct. 927, 928-31 (1950); *J.I. Case Corp. v. Williams*, 832 S.W.2d 530, 531-32 (Tenn. 1992).

**V.**

Accordingly, we affirm in part and vacate in part the trial court's decisions and remand the case for further proceedings consistent with this opinion. We tax the costs of this appeal jointly and severally to New Beginning Credit Association, Inc. and Frank Andre William Iaquinta, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[22](...continued)
attended NBCA seminars in Tennessee.